IN THE COURT OF APPEALS OF IOWA

No. 3-1073 / 13-0848
Filed January 23, 2014

FLYNN BUILDERS, L.C.,
Plaintiff-Appellee,

vs.

MATTHEW P. LANDE and CHRIS LANDE,
Defendant-Appellants.

Appeal from the Iowa District Court for Boone County, William C. Ostlund, Judge.

Homeowners appeal the district court's remand decision to award damages to their general contractor. **AFFIRMED.**

Duane M. Huffer of Huffer Law, P.L.C. (until withdrawal), Story City, for appellants.

Meredeth C. Mahoney Nerem and John D. Jordan of Jordan & Mahoney Law Firm, P.C., Boone, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

VOGEL, P.J.

Homeowners, Matthew and Chris Lande, appeal the district court's ruling, following a remand from the Iowa Supreme Court, which awarded $16,296.00 to their contactor, Flynn Builders, L.C. The Landes claim the district court failed to heed the opinion of the supreme court and issued an opinion in contravention to the supreme court's decision. They also claim the district court incorrectly found they had a duty to pay Flynn Builders before the work was completed. They assert the court should have found Flynn Builders's actions preclude its recovery because of its fraud. In addition, the Landes claim the court should have awarded them damages and attorney fees, and the court was not impartial with its rulings.

Because we find the district court exceeded its remand jurisdiction in finding Flynn Builders substantially performed the building contract, we strike that portion of the district court's decision. However, we affirm the district court's conclusion that Flynn Builders was excused from substantial performance because of the Landes' prior breach when the Landes refused to pay under the contract and that the hidden markup on the building materials did not materially affect the parties' contractual obligations. We find no evidence of bias or impartiality on the part of the district court, and we award $5000 in appellate attorney fees to Flynn Builders.

I. BACKGROUND FACTS AND PROCEEDINGS.

This is the third time this case has been before an appellate court, and the second time it has been before this court. The facts of this case have been thoroughly and completely addressed in the previous two appellate cases, and

we will not again repeat them here. *See Flynn Builders, L.C. v. Lande (Flynn Builders II)*, 814 N.W.2d 542, 544–45 (Iowa 2012); *Flynn Builders, L.C. v. Lande (Flynn Builders I)*, No. 10-1278, 2011 WL 4578518, at *1 (Iowa Ct. App. Oct. 5, 2011), *vacated in part*, 814 N.W.2d at 548.

The Iowa Supreme Court determined Flynn Builders did not substantially perform the contract, reversing the decision of our court and the district court on this issue. *Flynn Builders II*, 814 N.W.2d at 546. The evidence showed approximately 80% of the home was completed when Flynn Builders walked off the job. *Id.* The supreme court ruled,

> While [n]o mathematical rule relating to the percentage of the price, of costs of completion, or of completeness can be laid down to determine substantial performance of a building contract, the work left unfinished in this case was much more than a technical or inadvertent omission; rather the omissions materially affected the habitability of the house.

Id. at 547 (alteration in original) (internal quotation marks and citations omitted). While it resolved the substantial performance issue, the supreme court recognized that "there may be additional legal and factual issues not reached by the district court that have an impact on the disposition of the case." *Id.* The supreme court identified that the district court did not address

> factual disputes in the record for the reason Flynn walked off the job and whether the lack of specific performance might be excused by the conduct of the Landes. The district court also did not address the significance if any, of the hidden nature of the markup on the ability of Flynn to enforce a mechanics lien.

Id. at 547–48 (internal citations omitted). The supreme court then remanded the case to the district court for further proceedings.

On remand the district court and the parties identified two issues to be addressed: (1) whether the lack of specific performance can be excused by the conduct of the Landes and (2) does the hidden nature of the "markup" prevent Flynn Builders from enforcing the mechanic's lien. Seemingly in contravention to the supreme court's ruling, the district court on remand stated: "The court determines that Flynn substantially performed the contract for several reasons. First, there was substantial testimony at trial that the job was at least 80% completed, if not more so. There were significant 'finish' items left to be completed such as trim, carpet, drywall and plumbing."

The district court did not stop there, but went on to state that there was a factual dispute as to why Flynn did not complete the job. The court concluded the testimony from both parties indicated that it was the Landes that first refused to pay Flynn Builders, "in essence breaching the contract." "With Landes breaching the contract, performance by Flynn is excused." The court also found the fact that Flynn "hid" the markup in the cost of the materials package "does not materially affect the overall contractual liability of the parties." The fact that the Landes did not know that the markup was included in the price was irrelevant because they agreed to the total dollar figure and there was no additional cost to them, according to the district court. Moreover, the court found a markup practice was "not uncommon within the industry."

The court awarded Flynn Builders a total of $16,296.00 (plus accruing interest), which amounted to 80% of the lien it was seeking to recover. The court denied both parties' requests for attorney fees finding it "equitable that each party pay their own attorney fees."

II. SCOPE OF REVIEW.

The action to enforce a mechanic's lien is in equity, and therefore, our review is de novo. *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 63–64 (Iowa 2003). We "give weight to the fact findings of the district court, but [we are] not bound by them." Iowa R. App. P. 6.904(3)(g).

III. SUBSTANTIAL PERFORMANCE.

In the previous appeal, the supreme court made clear that the work Flynn Builders had done prior to leaving the job did not satisfy the substantial performance requirement to enforce its mechanic's lien. *Flynn Builders II*, 814 N.W.2d at 545–46 (holding that a requirement to enforce a mechanic's lien is that the work must be substantially performed by the contractor and Flynn Builders did not substantially perform the contract). Nonetheless, the district court on remand ruled Flynn Builders did substantially perform the contract.

"It is a fundamental rule of law that a trial court is required to honor and respect the rulings and mandates by appellate courts in a case." *City of Okoboji v. Iowa Dist. Ct.*, 744 N.W.2d 327, 331 (Iowa 2008). "On remand, the trial court is limited strictly to the terms of the [remand] order. There is nothing for the trial court to do except conduct whatever proceedings are mandated and to make a determination thereon." *State v. Johnson*, 298 N.W.2d 293, 294 (Iowa 1980). "A mandate to the district court contained in a decision of this court becomes the law of the case on remand, and a district court that misconstrues or acts inconsistently with the mandate acts illegally by failing to apply the correct rule of law or exceeding its jurisdiction." *City of Okoboji*, 744 N.W.2d at 330.

Because the supreme court already decided on the record presented that Flynn Builders did not substantially perform under the contract, and no further evidence was submitted on remand, the district court exceeded its jurisdiction on remand by holding Flynn Builders substantially performed. *See id.* at 331 ("If the district court proceeds contrary to the mandate, its decision is viewed as null and void."). We strike that portion of the district court's opinion that holds Flynn Builders substantially performed. However, a second remand is unnecessary in this case because the district court went on to address the issues identified by the supreme court: "the factual disputes in the record for the reason Flynn walked off the job and whether lack of specific performance might be excused by the conduct of Landes" and "the significance, if any, of the hidden nature of the markup on the ability of Flynn to enforce a mechanic's lien." *Flynn Builders II*, 814 N.W.2d at 547–48.

The district court concluded, based on the evidence already in the record, the failure of Flynn Builders to substantially perform was excused by the Landes' breach of the contract when Matthew Lande refused to pay Flynn Builders for the work. The Landes claim on appeal the district court erred in concluding they had the duty to pay under the contract before Flynn Builders had a duty to perform. In support of their claim, the Landes cite to Iowa Code section 572.13(1) (2009), which provides:

> An owner of a building, land, or improvement upon which a mechanic's lien of a subcontractor may be filed, is not required to pay the original contractor for compensation for work done or material furnished for the building, land, or improvement until the expiration of ninety days after the completion of the building or improvement unless the original contractor furnishes to the owner one of the following:

> a. Receipts and waivers of claims for mechanics' liens, signed by all persons who furnished material or performed labor for the building, land, or improvement.
>
> b. A good and sufficient bond to be approved by the owner, conditioned that the owner shall be held harmless from any loss which the owner may sustain by reason of the filing of mechanics' liens by subcontractors.

Because neither of the exceptions was satisfied in this case, the Landes contend they did not have a duty to pay Flynn Builders until ninety days after the completion of the home. Landes made the same assertion to this court in the first appeal. *See Flynn Builders I*, 2011 WL 4578518, at *3. Our court found Landes' claim that the court erred in permitting recovery by Flynn Builders in violation of section 572.13 was not preserved for appellate review. *Id.* Our court went on to say that even if the claim had been preserved, it would have failed because section 572.13 is restricted in its application. *Id.* It only applies to preclude a general contractor from collecting the amounts charged by subcontractors, not for amounts charged for the services of the general contractor. *Id.* The only amounts at issue in this case are amounts due the general contractor—Flynn Builders, not amounts charged by subcontractors. Therefore, the Landes' attempt to use section 572.13 to assert Flynn Builders had to complete the construction before they were obligated to pay is unfounded.

The contract in this case did not set out a schedule of performance, but the prior course of dealing between the parties indicated that payment would be made to Flynn Builders in installments as requested during the course of construction. *See* Restatement (Second) of Contracts § 223, at 158 (1981) ("(2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement."). When Flynn Builders

sought its second installment payment, the Landes refused to make the payment. The district court found this refusal to pay was the first breach of the contract, excusing Flynn Builders from performance at that time. *See* 56 C.J.S. *Mechanics' Liens* § 86, at 110 (2007) ("The owner's refusal to pay an installment due under the contract ordinarily is a justification of the contractor's refusal to complete its obligations under the contract."). Where a contractor abandons the contract or ceases work before completion, it is still entitled to a lien for what was done or furnished so long as "the abandonment is attributable to the fault of the owner, and the contractor was free from fault in the matter and justified in abandoning the work." *Id.* We agree with the district court's conclusion that Flynn Builders was justified in not completing the construction project due to the Landes' "declaration that they would not pay any additional monies to Flynn."

IV. FLYNN BUILDERS'S MARKUP.

The other issue identified for the remand by the supreme court was the significance, if any, of Flynn Builders's failure to identify the markup on its ability to enforce the mechanic's lien. While not condoning Flynn Builders's conduct in hiding the markup of the materials package of the agreement, the district court found Flynn Builders's conduct was "not uncommon within the industry" and "does not materially affect the overall contractual liability of the parties." The court found the Landes had agreed to pay $61,223.77 for the materials package. The fact that they did not know there was a markup included in this figure was irrelevant. They incurred no additional cost and had previously agreed to the overall bid price of the project. The court also noted expert testimony established

a ten percent markup of the overall home cost was typical for general contracting fees in the area.

The Landes assert on appeal that the hidden markup was a material misrepresentation rendering the contract voidable. They assert had they known of the markup, they would not have agreed to the contract. However, as the district court found, they agreed to the overall price for Flynn Builders to construct their home. The markup they subsequently discovered did not increase the contract price of the home. There was no evidence that the lack of an expressed markup in the contract induced the Landes to sign the agreement. *See Kanzmeier v. McCoppin*, 398 N.W.2d 826, 830 (Iowa 1987) ("A misrepresentation is not material unless it is likely to induce a reasonable person to assent to a contract, or there is some special reason, known to the party making the representation, that it is likely to induce the particular person to manifest his assent."); s*ee also Rubes v. Mega Life & Health Ins. Co.*, 642 N.W.2d 263, 269 (Iowa 2002) (identifying the elements of equitable rescission to avoid a contract as "(1) a representation, (2) falsity, (3) materiality, (4) an intent to induce the other to act or refrain from acting, and (5) justifiable reliance"). We agree with the district court's conclusion that the hidden markup did not materially affect the parties' contractual obligations.

Because we have affirmed the district court's decision awarding Flynn Builders a portion of its mechanic's lien, we do not need to address the Landes' claim on appeal that the district court should have awarded it damages and attorney fees.

V. IMPARTIALITY.

The Landes also allege the district court failed to be impartial with its rulings in this case. They assert there were many misstatements of the record in the district court's ruling. They also point to several parts of the transcript from the trial where they claim the district court "commented on the Landes' counsel" and "repeatedly asked the Landes and their witnesses intimidating questions." The issue of the judge's impartiality was addressed in the first appeal to this court. *Flynn Builders I*, 2011 WL 4578518, at *5. The claim was rejected based on our court's de novo review of the record. *Id.* This decision was affirmed when the supreme court took the matter on further review. *Flynn Builders II*, 814 N.W.2d at 543 n.1 ("The defendants raise six separate issues in their application for further review. In the exercise of our discretion, we choose to only address the issue related to substantial performance of the construction contract. As to the other issues raised on appeal, the court of appeals' opinion will stand as the final decision in this appeal.").

Because the lack of impartiality of the judge at the initial trial was raised and previously decided by our court, we will not address it again here. The only additional allegation of impartiality the Landes make that occurred after the remand is the court's use of Flynn Builders's proposed ruling. The Landes claim it contained misstatements of the record. We have reviewed the facts that the Landes claim are misstatements and find no evidence of bias or any indication the judge was not impartial. The district court clearly believed the testimony of Flynn Builders's witnesses over the Landes, but this does not render the court biased. We give weight to the factual findings of the district court, especially its

assessment of the credibility of witnesses. Iowa R. App. P. 6.904(3)(g). We see no evidence of bias or impartiality on the part of the district court.

VI. ATTORNEY FEES.

Finally, Flynn Builders seeks an award of appellate attorney fees pursuant to section 572.32—"In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, a prevailing plaintiff may be awarded reasonable attorney fees." *See Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 23 (Iowa 2001) ("We therefore think [section 572.32] contemplates the award of appellate attorney fees."). In this case, Flynn Builders is the prevailing party, though we did strike the district court's statement that Flynn Builders substantially performed the contract. Flynn Builders has expended funds to defend the district court's ultimate order, and for that we award Flynn Builders $5000 in appellate attorney fees.

VII. CONCLUSION.

In conclusion, we find the district court exceeded its remand jurisdiction in finding Flynn Builders substantially performed the building contract, and we strike that portion of the district court's decision. However, we affirm the district court's conclusion that Flynn Builders was excused from substantial performance because of the Landes' prior breach when the Landes refused to pay under the contract. We also agree with the district court's conclusion the hidden markup on the building materials did not materially affect the parties' contractual obligations. We find no evidence of bias or impartiality on the part of the district court, and we award $5000 in appellate attorney fees to Flynn Builders.

AFFIRMED.